

IN THE  
**United States**  
**Circuit Court of Appeals**

For the Ninth Circuit

CLAUDE EMERSON DuVALL,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

APPELLANT'S PETITION FOR A REHEARING  
AND  
APPLICATION FOR STAY OF ISSUANCE  
OF MANDATE

LESLIE C. HARDY,  
422 Professional Bldg.,  
Phoenix, Arizona.

---

**FILED**

MAR 26 1935

PAUL P. PHOENIX



## TOPICAL INDEX

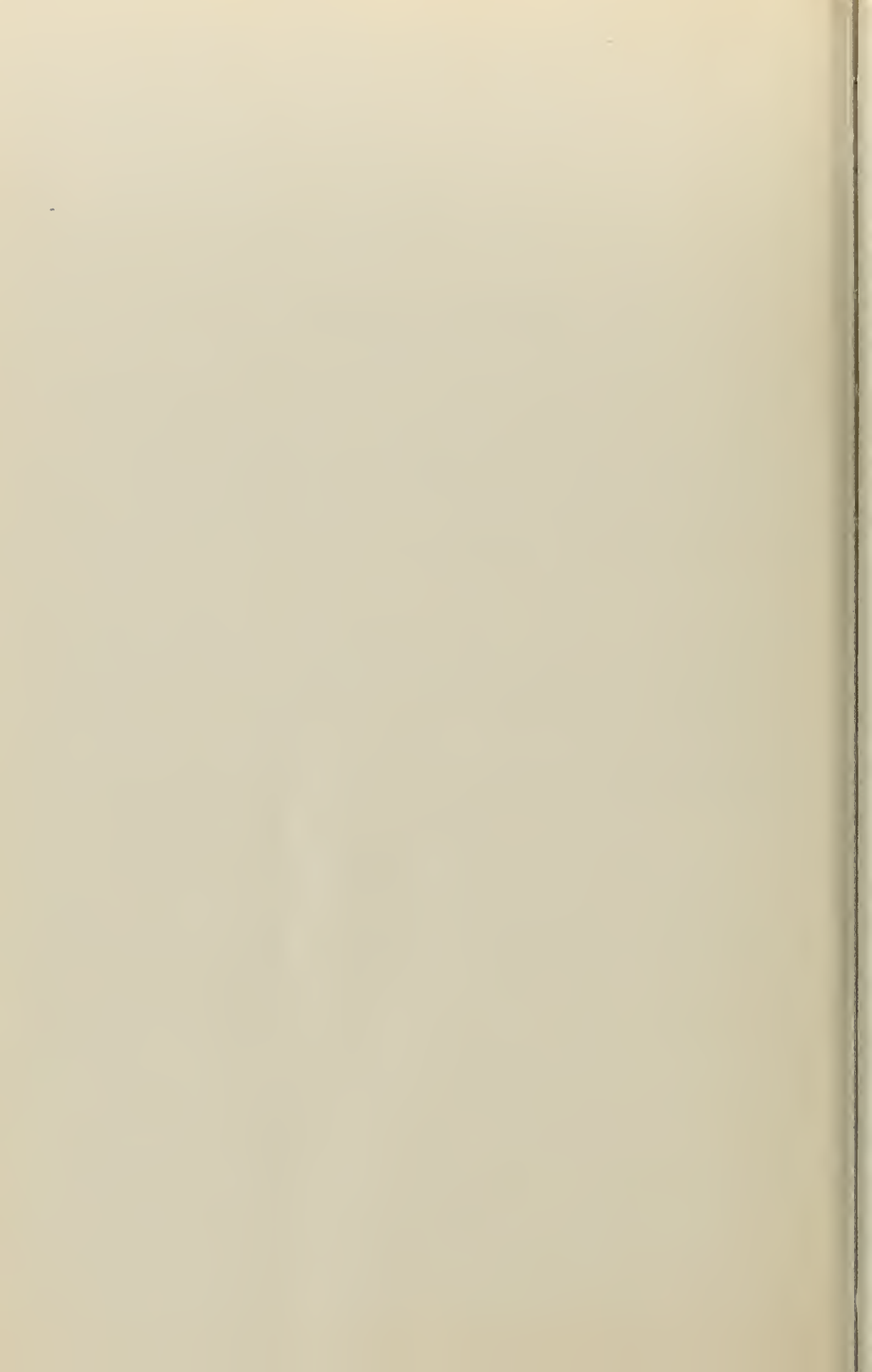
---

	Page
The Court erred in holding that the hypothetical question propounded to Dr. Townsend (Tr. 22, 23) and answered by him in the negative did not constitute reversible error.....	2
Argument .....	2
Application for Stay of Issuance of Mandate.....	4
Certificate of Counsel .....	5
Affidavit of Appellant.....	6-7

---

## CASES CITED

Linder vs. U. S. 268 U. S. 5.....	53
-----------------------------------	----



IN THE  
**United States**  
**Circuit Court of Appeals**  
For the Ninth Circuit

---

CLAUDE EMERSON DuVALL,  
Petitioner.

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

APPELLANT'S PETITION FOR A REHEARING  
AND  
APPLICATION FOR STAY OF ISSUANCE  
OF MANDATE

---

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the Circuit Court of Appeals for the Ninth Circuit:

The appellant herein respectfully petitions this Honorable Court for a rehearing of this cause, and for grounds thereof says:

## I.

*The Court erred in holding that the hypothetical question propounded to Dr. Townsend (Tr. 22, 23) and answered by him in the negative did not constitute prejudicial error.*

## ARGUMENT

(a) At the outset may we request that the omission of counsel to point out to the Court reasons why this unassigned error should be considered be not permitted to militate against appellant. We had thought, since the Court itself suggested the possibility of error, that we were only put to the duty of pointing out the error and not the reasons why the Court should consider it.

(b) In the opinion this Court says:

“The element of good faith in the case at bar is essentially one of criminal intent, and exclusively for the determination of the jury.” (Op. p. 7).

This element was incorporated in the question and answered by the witness-physician unfavorably to appellant. It is true that appellant indorsed upon the prescriptions the words “Article 85, Exception 1” but under the regulation he had no other alternative. His prescribing of morphine was limited to the purposes allowed by the Regulation. He did add on the prescriptions “Use as needed for relief of pain.” The validity of the Regulation is therefore directly involved.

We submit that if appellant had the right to prescribe morphine for the relief of a condition incident to addiction (*Linder vs. U. S.*, 268 U. S. 5) then because he indorsed upon the prescriptions a notation pertaining to the Regulation ought not in any wise deprive him of that right. The Commissioner left him no other alternative.

That appellant was prescribing for addiction is evident. (This is confirmed by the hypothetical question, Tr. p. 23; and the testimony of Rooney, pps. 18, 19, 20.)

Appellant was entitled to prescribe morphine for Rooney, who was a chronic morphine addict, to relieve his condition incident to the addiction, so long as unreasonable quantities were not prescribed regardless of whether appellant was treating Rooney for disease or addiction. *Linder vs. U. S.* supra. Therefore the question, by confining him to the Regulation, deprived him of a right which was error to take away from him.

We respectfully request that if the Court is impressed with the contention that appellant could prescribe the drug in question *to relieve* a condition incident to addiction, that then it reconsider its opinion in the respects here mentioned. At least, it seems to us, whether or no the entire evidence is incorporated in the record, sufficient appears to warrant a consideration of this element in the case measured by *Linder vs. U. S.*, supra.

Respectfully submitted,

LESLIE C. HARDY,  
Attorney for Appellant.

No. 7908

---

---

In The  
UNITED STATES CIRCUIT COURT OF APPEALS  
For the Ninth Circuit

---

CLAUDE EMERSON DuVALL,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

APPLICATION FOR STAY OF ISSUANCE  
OF MANDATE

---

To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

In the event appellant's Petition for Rehearing is denied appellant respectfully prays that this Court stay the issuance of the mandate from this Court pending the presentation and determination of a Petition for Writ of Certiorari to the Supreme Court of the United States, which Petition is now filed and pending in said Court.



In further support of this Application, there is attached the affidavit of the appellant herein, and there is filed herewith a copy of said Petition for Writ of Certiorari and the Brief in Support thereof, all of which appellant respectfully requests may be considered a part hereof.

Dated at Tucson, Arizona, this 16th day of March, 1936.

LESLIE C. HARDY,  
Attorney for Appellant.

---

#### CERTIFICATE OF COUNSEL

I, Leslie C. Hardy, Counsel for the appellant herein, do certify that in his opinion the foregoing Petition for Rehearing is well founded and meritorious and that neither said Petition or said Application For Stay of Issuance of Mandate are interposed for the purpose of delay.

Dated at Tucson, Arizona, this 16th day of March, 1936.

LESLIE C. HARDY,  
Attorney for Appellant.

In The  
UNITED STATES CIRCUIT COURT OF APPEALS  
For the Ninth Circuit

---

CLAUDE EMERSON DuVALL,  
Appellant,

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

AFFIDAVIT OF CLAUDE EMERSON DuVALL,  
APPELLANT, IN SUPPORT OF APPLICATION  
FOR STAY OF ISSUANCE OF MANDATE

---

United States of America    }  
State of Arizona                }ss.  
County of Pima                 }

Claude Emerson DuVall, first being sworn, upon  
oath deposes and says:

That he is the appellant herein and he makes and  
files this affidavit in support of his Application For  
Stay of Issuance of Mandate herein.

Affiant deposes and says that he, through his counsel, Leslie C. Hardy, Esq., has filed in the Supreme Court of the United States a Petition for Writ of Certiorari to review the decision of this Court rendered and filed herein on March 2, 1936.

Affiant further deposes and says that said Petition for Writ of Certiorari is not interposed for the purpose of delay but that it is interposed solely in order that affiant may invoke the rights and remedies accorded to him by the Constitution and Laws of the United States in an effort to preserve his liberty.

(sgd) Claude Emerson du Vall

Subscribed and sworn to before me this 23<sup>rd</sup> day of March, 1936.

(sgd) M. W. Johnston  
Notary Public.

My Commission expires:

Aug. 7<sup>th</sup> 1936

(Seal)

Service of two (2) copies of the within Petition for Rehearing and Stay of Issuance of Mandate admitted this.....day of March, 1936.

FRANK E. FLYNN,  
U. S. Attorney. *E. L.*

By.....